82-1266

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

LANCE EISENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARTIN R. BAACH
1800 M Street, Northwest
Washington, D.C. 20036
(202) 833-8900

EARL J. SILBERT
2828 Pennsylvania Avenue, Northwest
Washington, D.C. 20007
(202) 965-7910

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QUESTIONS PRESENTED

1. Whether the indictment of a tax attorney states a crime or is unconstitutionally vague where it charges him, in connection with legal advice to his clients, with conspiracy to impede and obstruct the Internal Revenue Service without alleging the commission of unlawful acts and without identifying whose taxes are referred to in the charge.

2. Whether the government improperly enhanced its Bank Secrecy Act charge from a misdemeanor to a felony.

PARTIES BELOW

The following listed persons were parties to the proceedings below:

United States of America, Plaintiff-Appellee/Cross-Appellant

Thomas M. Hajecate and
Thomas H. Hajecate, Defendants-Appellants/Cross-Appellees

Lance Eisenberg, Defendant-Cross-Appellee

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

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The Petitioner, Lance Eisenberg, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 23, 1982.

OPINIONS BELOW

By order dated March 27, 1981, the United States District Court for the Southern District of Texas dismissed the indictment against petitioner. This unpublished decision is reprinted in the Appendix hereto at 25a. On August 23, 1982, the United States Court of Appeals for the Fifth Circuit, with one judge dissenting, affirmed the district court's decision in part and reversed it in part. The opinion is reported at 683 F.2d 894 and reprinted in the Appendix at 1a. On November 1, 1982, the court of appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (App. 23a).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 23, 1982. On November 1, 1982, the court of appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. This Petition for a Writ of Certiorari was originally due on December 31, 1982. However, on December 18, 1982, the Court granted an extension of time in which to file this petition to January 28, 1983 (App. 56a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States, reads in pertinent part as follows:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

* * *

18 U.S.C. § 371 reads in pertinent part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

31 U.S.C. § 1058 reads as follows:

> Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be

fined not more than $1,000, or imprisoned not more than one year, or both.

31 U.S.C. § 1059 reads as follows:

> Whoever willfully violates any provision of this chapter where the violation is—
>
> (1) committed in furtherance of the commission of any other violation of Federal law, or
>
> (2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,
>
> shall be fined not more than $500,000 or imprisoned not more than five years, or both.

31 U.S.C.A. § 5322(a) and (b) reads as follows:

> (a) A person willfuly violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

STATEMENT OF THE CASE

Petitioner Lance Eisenberg is a tax attorney and member of the Florida Bar. He is a graduate of the N.Y.U. Masters Program in taxation and is a former Tax Court law clerk. He specializes in international taxation.

Mr. Eisenberg was indicted on January 21, 1981, along with two co-defendants, his clients, Thomas M. and Thomas H. Hajecate (App. 28a). The charges against Mr. Eisenberg are confined to the first three counts of the eleven count indictment.

Count One charges that Mr. Eisenberg conspired with his clients to defraud the United States by obstructing the Internal Revenue Service ("IRS") in its collection of income taxes in violation of 18 U.S.C. § 371 (Object 1); and by obstructing the Customs Service's maintenance of records of financial transactions between foreign financial institutions and United States citizens (Object 2). Count One also charges that Mr. Eisenberg conspired with his clients to make false statements in their 1976 federal income tax returns (Object 3) and to transport currency in excess of $5,000 into the United States without reporting it to the Customs Service (Object 4).

Counts Two and Three of the indictment charge Mr. Eisenberg with aiding and abetting his clients in making false statements on their 1976 federal income tax returns in violation of 18 U.S.C. §§ 2 and 1001.

On January 30, 1981, Mr. Eisenberg moved to dismiss Counts One, Two and Three as to him.[1] On March 18, 1981, at the conclusion of lengthy oral argument, the district court dismissed the entire indictment, holding that no factual issues were presented and that all of the grounds urged by defendants were meritorious (App. 27a).

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[1] The Hajecates' motion to dismiss the indictment for legal insufficiency was granted at the same time as Mr. Eisenberg's. The Hajecates also moved to dismiss the indictment for prosecutorial vindictiveness. That motion was denied.

On August 23, 1982, in a 2 to 1 decision, the Fifth Circuit affirmed in part and reversed in part. It affirmed the dismissal of Counts Two and Three and the dismissal of Object Three of Count One. It reversed the dismissal of Objects One, Two and Four of Count One and ordered those portions of the indictment reinstated (App. 1a).

Petitioner seeks a writ of certiorari to review (i) whether Object One of Count One fails to state a crime or is unconstitutionally vague; and (ii) whether the government improperly enhanced its charge under the Bank Secrecy Act, Objects 2 and 4 of Count One, from a misdemeanor to a felony.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With Applicable Decisions Of This Court, Or At A Minimum Presents An Important Question Of Federal Law Which Has Not Been, But Should Be Settled by This Court.

The crux of the indictment is Count One, Object One which charges Mr. Eisenberg with conspiring with his clients to defraud the United States by obstructing the IRS in violation of 18 U.S.C. § 371. This indictment marks the first reported decision in which the government has brought criminal conspiracy charges against a tax lawyer for advice to his clients where the tax and business justifications for the recommended transaction were indisputably legitimate.

While the tax aspects of the transaction in this case are complex, the transaction itself can be succinctly summarized. Mr. Eisenberg's advice concerned a loan from the Southeast First National Bank of Miami ("Southeast") to Hajecate Oil and Gas, Inc., a business owned by the Hajecates (App. 29a, 32a). The indictment charges, and for the purposes of the appeal and this petition Mr. Eisen-

berg must concede, that Mid-Atlantic Petroleum Company, Ltd. ("MAPCO"), a company allegedly controlled by the Hajecates, had substantial funds in a foreign bank account (App. 28a, 31a-37a). The indictment further charges that the loan was collaterialized by MAPCO funds even though International Business Transactions, Ltd ("IBT"), a Bahamian corporation not controlled by the Hajecates, purchased the certificates of deposit which were posted as collateral for the loan at Southeast (App. 32a-34a). The indictment also charges that the loan was made, and IBT was used to collaterialize it, in order to conceal MAPCO, and the Hajecates' relationship with MAPCO, from the IRS (App. 31a-33a).

Petitioner's brief on appeal devoted five full pages to a detailed explanation of the tax purpose for each step of the loan transaction (App. 47a). Among the aspects of the transaction for which the tax justification was given were: (i) why the loan came from a domestic bank even though there was a foreign source of funds; (ii) why IBT, not MAPCO, was used to post collateral for the loan; and (iii) why MAPCO's silver straddle investments obviated any need to "conceal" MAPCO or the Hajecates' alleged interest in it. Neither in its Reply Brief nor at oral argument did the government dispute one element of the explanation given (App. 52a).

As noted above, petitioners demonstrated that (a) the loan structure had sound and legitimate tax avoidance purposes and (b) there is nothing illegal in concealment without more. As the Fifth Circuit noted: "the government responds that the indictment does not allege that these transactions were illegal in and of themselves" (App. 4a).

Nevertheless the Fifth Circuit ruled that the indictment, which charged transactions which were in fact

wholly legitimate and further, failed to identify whose taxes were involved, neither failed to state a crime nor was unconstitutionally vague. This novel, expansive application of conspiracy law is impermissible.

A. The Indictment Charges Transactions Which Were In Fact Legitimate And Therefore Fails To State An Offense.

Unlike tax evasion, tax avoidance is not a crime. A taxpayer is entitled to take advantage of any provision of the Internal Revenue Code that would reduce or avoid obligations. As Judge Learned Hand stated in an oft-quoted dissent:

> Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Commissioner of Internal Revenue v. *Newman*, 159 F.2d 848, 850-51 (2d Cir.), *cert. denied*, 331 U.S. 859 (1947). A taxpayer has the right to arrange his business transactions in any legal fashion which avoids taxation. As the Court stated in *United States* v. *Isham*, 84 U.S. (17 Wall.) 496, 506 (1873):

> It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. * * * While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

It is a tax lawyer's duty to counsel the most effective methods of tax avoidance. He is bound by the Code of Professional Responsibility to do so "zealously." (ABA CANONS OF PROFESSIONAL RESPONSIBILITY NO. 7 (1980).) Indeed, as stated in Note 2 to ABA Canon 7:

> [The tax lawyer's] own notions of policy, and his personal view of what the law should be, are irrelevant. The job entrusted to him by his client is to use all his learning and ability to protect his client's rights, not help in the process of promoting a better tax system. [T]he client is paying for technical attention and undivided concentration upon his affairs.

See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS NO. 314 (1965).

A fine line often separates tax avoidance and tax evasion. And a tension exists between that line and the tax lawyer's professional duty to his client. For these reasons, a criminal proceeding "is an improper vehicle for pioneering interpretations of the tax law." *United States* v. *Garber*, 607 F.2d 92, 100 (5th Cir. 1979). Despite that tension, and its own statement in *Garber*, the Fifth Circuit sanctioned an indictment which charged a tax lawyer with conspiring to defraud the United States where the advice he gave his clients was indisputably legitimate.

Under these circumstances, the Fifth Circuit's decision reversing the dismissal of Count One, Object One places all tax lawyers in an untenable position. They must strive to avoid their clients' tax liability, yet are susceptible to criminal charges for conspiracy to defraud even where no wrongful act other than "intent to defraud" is alleged. In any context, at any moment, the tax lawyer's advice may go beyond the ill-defined pale and be charged as criminal—even where he counseled legitimate actions. As shown below, this has never been the case before.

Without addressing this conundrum, however, the court of appeals relied upon *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709 (1962), and held that an attorney's advice to structure a business transaction in a sound manner will lose its "legal character" when an indictment charges, in the mere words of the statute, that the lawful transaction was intended "to defraud the United States" (App. 4a). This result ignores the distinction between a conspiracy to commit an offense (that is, to violate a criminal statute) and a conspiracy to defraud the United States. While the principle of *Continental Ore* applies to conspiracies to commit an offense, it is insufficient, standing alone, to salvage the indictment in this case.

Where, as in *Continental Ore*, the object of the conspiracy is to commit a substantive crime, *e.g.*, a conspiracy to rob a bank, an indictment charging only lawful methods and means still clearly describes the criminal aspect of the offense. Where, however, an indictment charges a conspiracy to defraud, (combining the two potentially unlimited concepts of "conspiracy" and "defraud"), a charge stating only legitimate methods and means fails to state an offense.

This Court has repeatedly emphasized the special character of the second type of § 371 conspiracies—conspiracies to defraud the United States. Because of the inherent vagueness of the charge,[2] it cannot be sufficient to couple a series of wholly legitimate transactions as the methods and means with only a conclusory allegation of

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[2] See the seminal, and still authoritative, article on this issue, Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L. J. 405 (1959).

intent to defraud. This Court has mandated that unlawful means must be alleged in prosecutions for conspiracy to defraud the United States (*Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)):

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

Relying on *Hammerschmidt* and its progeny, courts in various circuits have acknowledged the potential for vagueness in conspiracy to defraud charges and warned:

> In considering a conspiracy under § 371, a court must be mindful that the statute is a broad one, and that there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the federal criminal sanction. Thus, indictments brought under § 371 must be carefully scrutinized.

United States v. *Shoup*, 608 F.2d 950, 955-56 (3d Cir. 1979) (footnote omitted). *Accord*, *United States* v. *Walker*, 653 F.2d 1343, 1353 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982). Indeed, even the majority opinion recognized this requirement (App. 5a).

Thus, prior to this case, indictments for conspiracy to defraud spelled out a scheme involving patently unlawful methods and means whose clear purpose it was to obstruct the IRS from ascertaining and collecting taxes. In all such reported cases, especially those against attorneys for advice to clients, the indictments revealed flagrantly dishonest transactions calculated to mislead the IRS. *See, e.g.*, *United States* v. *Enstam*, 622 F.2d 857, 862-63 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) ("bogus business deductions;" "fictitious interest payments"); *United*

States v. *Klein*, 247 F.2d 908, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958) (false returns on books; false answers to IRS interrogatories); *United States* v. *Baskes*, 442 F. Supp. 322 (N.D. Ill. 1977), *aff'd*, 649 F.2d 471 (7th Cir. 1980) (backdated documents covering up a $700,000 valuation for a worthless mining claim).

In stark contrast to these prior decisions, the transactions described in Count One, Object One were lawful business transactions which reflected legitimate tax planning. None of the methods or means allegedly used to accomplish the conspiracy to obstruct involved dishonest or illegal acts by Mr. Eisenberg (App. 47a-51a). Object One cannot be based on those methods and means allegations applicable solely to Objects Two, Three or Four.[3]

The Fifth Circuit, reversing the District Court's decision, sanctioned an indictment of a tax attorney for advice to his clients where the tax and business justifications for the recommended transaction were indisputably legitimate. The court of appeals found sufficient an indictment which, in effect, charges that legitimate tax avoidance techniques were criminal because the defendants intended to "defraud the United States." This indictment fails to state a crime.

B. The Indictment Fails To Identify Whose Taxes Are Involved.

Count One, Object One comprises the bulk of the indictment. It is, in dissenting Judge Garwood's words, "ex-

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[3] Paragraph 3(i) of Count One alleges illegal currency transfers but there is no charge that such transfers are related to the alleged conspiracy to defraud the IRS. Paragraph 3(j) of Count One alleges false tax return statements. The Fifth Circuit held that these statements were responsive to investigatory questions, and hence under the "exculpatory no" doctrine the making of the statements was not a crime under 18 U.S.C. § 1001 (App. 9a-13a).

tremely complex and confusing" (App. 17a). Yet despite its length and detail, it "fails to state, or even clearly infer, whose income taxes are involved" (App. 17a). This failure alone renders the charge unconstitutionally vague.

The principles governing the sufficiency of an indictment were laid down by this Court more than a century ago in *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876):

> The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

Each element of the offense must be described with sufficient particularity to permit the defendant to understand the charge, to prepare his defense, and to interpose a double jeopardy plea in a subsequent prosecution.[4] The dissent was correct in its conclusion that the indictment failed to meet this standard.

The charge of a conspiracy to defraud the United States by obstructing the IRS is commonly called a *Klein*-conspiracy, so named after *United States* v. *Klein*, 247

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[4] As this Court stated in *Cruikshank*, (92 U.S. at 558) and reaffirmed in *Russell* v. *United States*, 369 U.S. 749, 765 (1962):

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.

F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). *Klein* and its progeny define two key elements that must be alleged with particularity: (1) the defendants' *purpose* to obstruct the IRS from ascertaining or collecting taxes; and (2) the *manner* in which the defendants' activities served that purpose.

While Count One relates largely to the alleged plan to conceal the existence of MAPCO (and the Hajecates' relationship with it), it nowhere alleges the essential nature of the defendants' purpose in such concealment to obstruct the IRS. It does not allege how such concealment would impede the IRS in the ascertainment or collection of income taxes, or even whose income taxes the IRS was obstructed from computing and collecting. Indeed, the government has taken conflicting positions on this important issue.

The government, in its brief on appeal, took the position that the relevant taxes are those of the Hajecates individually (App. 46a). However in its bill of particulars, the government took the position that the taxpayers involved were not only the Hajecates, but also the four corporations they allegedly controlled (App. 45a):

> 21. Paragraph 2.a: The names and addresses of each taxpayer whose income taxes the IRS was impeded, impaired, obstructed and defeated in ascertaining, computing, assessing, and collecting.
>
> Answer: Thomas H. Hajecate, Thomas M. Hajecate, Uni Oil, Inc., Hajecate Oil and Gas, Inc., MAPCO, H.C. Iran, Ltd.

At oral argument in the Fifth Circuit the government took yet a third position. It "disavowed the position taken in the brief, and said the bill of particulars was correct,

except that the count did not relate to MAPCO's income taxes" (App. 17a).[5]

As Judge Garwood recognized, it is vital for double jeopardy purposes for Mr. Eisenberg to know to whose taxes the conspiracy charge relates. *See, e.g., United States* v. *Wilson*, 420 U.S. 332, 339-44 (1975); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The double jeopardy analysis is particularly important, and difficult, where there are charges of a conspiracy to defraud. *See, e.g., United States* v. *Kamins*, 479 F. Supp. 1374, 1381 (W.D. Pa. 1979).

Judge Garwood correctly concluded that the indictment's failure to identify, or even clearly infer, the taxpayer is sufficient grounds to require its dismissal (App. 18a):

> The conspiracy alleged in the indictment covers a three-year period, and it seems to me to be vital for double jeopardy purposes to know whose taxes the indictment charges that defendants conspired to defraud the government of. If, for example, the indictment does not charge a conspiracy during that time to defraud the government of MAPCO's or Uni Oil's taxes, does it protect defendants against a subsequent charge for such offense? The government has taken three different positions regarding the meaning of the indictment in this connection, and on each occasion the government's action appears to have been deliberate and considered and taken in full awareness of its significance. Under the circumstances, count one fails to adequately identify the

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[5] The majority deals with these inconsistencies by simply declaring they do not exist (App. 6a) ("The obstruction charge goes to the Hajecates' taxes only. . . ."). The finding is simply wrong.

> first object offense of the conspiracy. Accordingly, I would hold this portion of count one invalid.

This utter failure to identify the taxpayer in the indictment, coupled with the government's subsequent three conflicting positions on this issue, renders the indictment unconstitutionally vague.

2. The Decision Below Presents An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court.

The second and fourth objects of Count One charge conspiracies to violate the Bank Secrecy Act (31 U.S.C. §§ 1101 and 1121) "in furtherance of" violations of 18 U.S.C. §§ 371 and 1001. As the dissent below recognized, these novel charges improperly enhance misdemeanors into felonies.

The Bank Secrecy Act establishes reporting requirements for the export and import of monetary instruments. Section 1058 of the Act made it a misdemeanor to violate the reporting requirements. Section 1059(1) made such violations felonies if they were "committed in furtherance of the commission of any other violation of Federal law."

As described below, the indictment improperly enhances § 1058 misdemeanors into § 1059(1) felonies because of its failure to charge a proper offense "in furtherance of" which the reporting requirement violation occurred. The dissent below correctly recognized that (App. 16a):

> nowhere in the entire indictment is the conduct allegedly constituting the 'in furtherance' offenses identified in even the most general way. Neither on

> brief nor on argument does the government favor us with *any* such identification.

As a consequence, the alleged violations of the Bank Secrecy Act reporting requirements must be misdemeanors under § 1058.

The majority opinion suggests that the conduct constituting the "in furtherance" offense is concealment of the foreign bank account from the Customs Service (App. 8a). But this suggestion is erroneous. The dissent properly rejected this reasoning noting that the sole obligation to disclose such information is imposed under the Bank Secrecy Act itself. Since the "in furtherance" offense was not part of a violation of another Federal law, it was insufficient to justify charging a felony violation under § 1059(1).

Indeed, the requirement that the "in furtherance" violation involve a federal law other than the Bank Secrecy Act is made clearer in the current version of sections 1058 and 1059. The sections were revised and recodified without any substantive change. 31 U.S.C.A. § 5322(a) and (b).[6] The current version clearly requires that a violation of the Act is a felony only where it occurred "while violating *another law of the United States* . . .." (Emphasis added.)

In *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979), defendants were charged with 377 misdemeanor violations of § 1058 and with four felony violations of § 1059 arising from the same facts alleged in the mis-

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[6] *See* H.R.Rep. No. 97-651, 97th Cong., 2nd Sess. at 1 ("The purpose of the bill is to restate in comprehensive form, without substantive change, certain general and permanent laws related to money and finance and to enact those laws as title 31, United States Code.").

demeanor counts. In *Beusch*, the government conceded that only § 1059(2) applied. "§ 1059(1) does not apply because the facts here show no other violation of federal law, in the furtherance of which the Bank Secrecy Act was also violated." 596 F.2d at 878.

On appeal the government sought to circumvent this requirement by charging that the alleged violations of 18 U.S.C. §§ 371 and 1001 constituted the "in furtherance" violations. As the dissent noted, this does not suffice. The § 1001 counts were dismissed and, as to the § 371 charges (App. 16a-17a):

> Nor does dragging the same conduct in through the back door by labeling it a violation of 18 U.S.C. §§ 371 and 1001 enhance the government's position in this regard. So far as I am aware, the offense of conspiring to commit a conspiracy is unknown to the federal criminal law. Moreover, "defrauding" the government with respect to performance of its functions under the Bank Secrecy Act, or concealing (or conspiring to conceal) something within the jurisdiction of the Treasury Department under such Act, cannot properly constitute an "enhancing" offense under section 1059(1). The contrast between subsections (1) and (2) of section 1059 makes it plain that the former applies only to "activity not involving violations of the Bank Secrecy Act." *See United States* v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979).

Consequently, Objects Two and Four of Count One also fail to state a crime.

CONCLUSION

This case is of grave importance to the administration of the tax laws. Given the settled principle that tax avoidance is a proper goal, tax attorneys must be free to test the limits of the tax laws without putting themselves and their clients in jeopardy of criminal prosecution. It is

respectfully prayed that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MARTIN R. BAACH
1800 M Street, Northwest
Washington, D.C. 20036
(202) 833-8900

EARL J. SILBERT
2828 Pennsylvania Avenue, Northwest
Washington, D.C. 20007
(202) 965-7910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari were served on each of the following: Rex E. Lee, Solictor General of the United States, Tenth & Constitution Avenue, N.W., Washington, D.C. 20530; John F. Murray, Michael L. Paup, Tax Division, United States Department of Justice, Tenth & Constitution Avenue, N.W., Washington, D.C. 20530; Michael E. Tigar, Tigar & Buffone, 1302 18th Street, N.W., Washington, D.C. 20036; and Thano Dameris, 3618 Yoakum Boulevard, Houston, Texas 77006, by depositing true copies thereof in the United States mail, first-class, postage prepaid on this 28th day of January, 1983.

/s/ Martin R. Baach
MARTIN R. BAACH

UNITED STATES OF AMERICA, *Plaintiff-Appellant Cross Appellee,*

v.

Thomas M. HAJECATE and Thomas H. Hajecate, *Defendants-Appellees Cross Appellants,*

Lance Eisenberg, *Defendant-Appellee.*

No. 81-2130.

United States Court Of Appeals, Fifth Circuit.

Aug. 23, 1982.

The United States District Court for the Southern District of Texas, Woodrow B. Seals, J., entered order dismissing indictment but denying motion to dismiss based on alleged prosecutorial vindictiveness, and appeal and cross-appeal were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) legal transactions allegedly used to bring about unlawful object of obstruction of Internal Revenue Service were not "equally capable of legal interpretation" such as would render invalid conspiracy indictment; (2) indictment adequately particularized alleged conspiracy to obstruct Internal Revenue Service; (3) conspiracy indictment adequately alleged as object of conspiracy obstruction of customs service; (4) tax return question inquiring whether taxpayer had "[any] interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country" was "investigative," and thus the "exculpatory no" doctrine applied to prosecution, brought under statute making false statements a federal crime, of defendant for allegedly answering such question with false response; (5) failure to incorporate counts alleging violation of federal law or pattern of illegal activity rendered defective indictment counts alleging violation of statute proscribing

willful violations of statutes governing reports of currency and foreign transactions; and (6) interlocutory appeal did not lie from denial of pretrial motion to dismiss for prosecutorial vindictiveness.

Appeal affirmed in part and reversed in part and remanded; cross-appeal dismissed.

Garwood, Circuit Judge, concurred in part and dissented in part and filed opinion.

Michael E. Tigar, John Privitera, Washington, D.C., for the Hajecates.

Joe H. Reynolds, Houston, Tex., Earl J. Silbert, Martin R. Baach, Washington, D.C., for Eisenberg.

Anna E. Stool, Asst. U.S. Atty., Houston, Tex., Michael L. Paup, Chief, Appellate Section, Glenn L. Archer, Jr., Asst. Atty. Gen., Robert E. Lindsay, James A. Bruton, James Springer, Attys., Tax Div., U.S. Dept. of Justice, Washington, D.C., for the U.S.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

In this criminal case, the government appeals the pretrial dismissal of an eleven-count indictment against businessmen Thomas M. ("Mick") Hajecate and Thomas H. ("Tom") Hajecate and their tax attorney, Lance Eisenberg. The defendants Hajecate cross-appeal the district court's denial of their motion to dismiss the indictment based on prosecutorial vindictiveness.

I. FACTS AND DISPOSITION BELOW.

On January 21, 1981, a grand jury in the Southern District of Texas returned an eleven-count indictment, charging the

three defendants with violations of several federal criminal laws.[1] All these violations stemmed from a scheme to conceal the Hajecates' interest in an offshore (Cayman Islands) bank account. As gleaned from the indictments, part and parcel of this scheme were obstruction of IRS tax collection, false statements on income tax returns, failure to report financial transactions between persons in the United States and foreign institutions to the Customs Service, and unreported transfers of money between the United States and the Cayman Islands. We shall give more details on the counts as necessary in our discussion of the issues on appeal. On February 25, 1981, a superseding indictment covering the same scheme and containing the same number of counts was filed.

The defendants sought bills of particulars on the indictment and moved for its dismissal as well. After a March 18, 1981, hearing, the district court dismissed all eleven counts as facially invalid, accepting "the Defendants' theory of law in every respect" except the allegation of prosecutorial vindictiveness.

II. THE GOVERNMENT'S APPEAL.

A. Count One.

Count one charged all three defendants with violating the federal criminal conspiracy statute, 18 U.S.C. § 371 (1976). This alleged conspiracy had four objects, all violations of federal law: (1) defrauding the United States by obstructing the IRS in its collection of income taxes; (2) defrauding the United States by obstructing Customs Service maintenance of records of financial transactions between foreign financial institutions and United States citizens; (3) knowingly and willfully making false statements on income tax returns; and (4) failure to report money transferred between the United States and the Cayman Islands. The defendants attacked the indictment's statement

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[1] Only counts 1-3 applied to defendant Eisenberg; all 11 counts applied to either or both of the defendants Hajecate.

of each object as facially invalid, and we address each object in turn.

Obstruction Of The IRS

In attacking the first object, the defendants claim that two transactions named as means and methods of furthering the conspiracy, a loan obtained by one of the Hajecates' oil companies and silver straddles engaged in by the Hajecates, are in fact legal transactions. Therefore, since these transactions are equally capable of legal interpretation, the indictment is invalid because it does not state an offense. *See Standard Oil Co. v. United States*, 307 F.2d 120, 130 (5th Cir. 1962). The government responds that the indictment does not allege that these transactions were illegal in and of themselves but that they lost their legal character because they were used to bring about the unlawful object of the scheme, obstruction of the IRS.

The government's position is correct: "it is well settled that acts which are themselves legal lose their legal character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 709, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962). Thus, these transactions are not "equally" capable of legal interpretation, and the government is not, as defendants' claim, testing the legality of silver straddles in this case. In the context of count one's allegation of conspiracy and recital of other illegal acts, these two transactions lose their legal character and do not render count one invalid.

Next, the defendants allege that count one failed to particularize the alleged scheme.

> The test to determine the sufficiency of an indictment is well established. An indictment is sufficient if it contains the essential elements of the offense so that it fairly informs the defendant of the charges against him and if it adequately enables the defendant to be protected against further prosecution for the same offense. Furthermore, an indictment is to be read in light of its purpose, which is

> to inform the accused of the charges against him. Its validity is governed by practical, not technical, considerations.

United States v. *Mouton*, 657 F.2d 736, 739 (5th Cir. 1981) (per curiam) (citations omitted). Conspiracy indictments have been given particularly careful scrutiny:

> It is our affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statute because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty.

United States v. *Porter*, 591 F.2d 1048, 1057 (5th Cir. 1979).

In examining a conspiracy indictment, the first test is to ascertain whether it goes beyond the generic terms of 18 U.S.C. § 371 and the statutes violated by the conspiracy to allege specific details about the scheme. *See Van Liew* v. *United States*, 321 F.2d 664, 669-74 (5th Cir. 1963). The IRS obstruction claim easily passes this test. A concise paragraph makes the allegation, and numerous "overt acts" and "means and methods" are cited in support in the remainder of count one. This has rendered count one longer and more complex than the other counts, yet it is still the plain and concise statement required by Fed.R.Crim.P. 7, since it outlines the essential elements of the complex conspiratorial scheme charged against the defendants. Unnecessary detail not found in count one was made available to defendants through two lengthy bills of particulars.

Defendants posit several specific failures to particularize that we must address. First, they claim that an allegation of Eisenberg's purpose in obstructing the IRS is fatally lacking. This argument has no merit. Eisenberg is clearly alleged to be a conspirator, and he thereby shares the purposes of the conspiracy, which are also clearly alleged in the indictment.

Second, defendants claim a lack of clarity as to whose taxes the IRS was obstructed from ascertaining. This lack of clarity allegedly arises from reading the indictment and the govern-

ment's answers to a bill of particulars. The government responds that the indictment reveals that the taxes at issue are those of the Hajecates and that the four corporations that they allegedly owned were used in the obstruction. Thus, the government stated in response to the bill of particulars that the IRS obstruction charge involved all six taxpayers.

We see no flaw here. The defendants see an inconsistency between the indictment and the bill of particulars where none exists. They are clearly on notice from the indictment that the obstruction charge goes to the Hajecates' taxes only and that the four corporations were used to conceal those taxes.

Even if the bill was inconsistent with the indictment, the proper remedy is not dismissal of the indictment but clarification of the bill. The indictment here, unless properly amended or superseded, constitutes the full statement of the charges against the defendants. They face no additional jeopardy from a bill, since it cannot be used to amend an indictment, *see United States* v. *Willoz*, 449 F.2d 1321, 1323 (5th Cir. 1971). It is the government that suffers if the bill goes beyond the indictment and improperly adds new charges. Thus, any inconsistency here does not harm the defendants in a constitutional sense, since the *indictment* is clear and determines the issues of notice and jeopardy.[2]

Finally, the defendants complain of ambiguity in the definitions of several terms in the indictment—"shell company," "affiliates," and "utilized and controlled." We believe that they are clear in their contexts and that any ambiguity does not rise to the level of a constitutional defect. Therefore, the appropri-

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[2] We, of course, will not countenance government tactics that confuse defendants by creating inconsistencies between the indictment and the bill. However, the response to such abuse, not present here, is to request clarification of the bill, not to dismiss the indictment.

ate remedy is to request a bill of particulars, not dismiss the indictment.

Overall, then, there is no defect in the first object of count one. What the defendants seek in many of their allegations is essentially the disclosure by the government of its full theory of the case and all the evidentiary facts to support it. That is not and never has been required at the indictment stage—the only requirements are notice to the defendants and preclusion of double jeopardy. The government need do no more in the indictment. The ready remedy of a motion for a bill of particulars is available to add specifics beyond those required for the indictment to pass constitutional muster, *see United States* v. *Williams*, 203 F.2d 572, 574 (5th Cir.), *cert. denied*, 346 U.S. 822, 74 S.Ct. 37, 98 L.Ed. 347 (1953), although, of course, even a bill of particulars cannot be required to compel revelation of the full theory of the case or all the evidentiary facts, *see United States* v. *Murray*, 527 F.2d 401, 411 (5th Cir. 1976); *United States* v. *Bonnet*, 247 F.Supp. 415, 417 (E.D.La. 1965) (Ainsworth, J.). We conclude that the government has fulfilled its duty here in presenting a constitutionally adequate indictment under object one and in voluntarily furnishing two bills of particulars to assist the defendants.

Obstruction of the Customs Service

Defendants repeat their allegation of generic pleading as to this object. This allegation has no more merit against this object than it did against the object of obstruction of the IRS. The object is stated in a concise paragraph and supported by a lengthy list of overt acts and means and methods. We do not examine particular paragraphs of an indictment out of the context of the remainder of the indictment. *See United States* v. *Hand*, 497 F.2d 929, 934-35 (5th Cir. 1974), *adopted on rehearing en banc*, 516 F.2d 472, 477 (1975), *cert. denied*, 424 U.S. 953, 96 S.Ct. 1427, 47 L.Ed.2d 359 (1976). As we have oft repeated, an indictment's validity "is governed by practical, not technical, considerations." *United States* v. *Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981).

Contrary to defendants' claim that "none" of the alleged overt acts relate to obstruction of the Customs Service, we find that several do. The list of means and methods references this object, and this list is sufficiently detailed to make it quite easy to ascertain which overt acts are involved in this object. This claim has no merit.

Finally, the defendants allege improper "pyramiding" of offenses under this object. This claim requires some explanation. Usually, withholding information from the Customs Service under 31 U.S.C. § 1121 is a misdemeanor. However, when done in furtherance of another offense it becomes a felony. *See* 31 U.S.C. §§ 1058, 1059. The government charges in count one that the section 1121 violation was in furtherance of a violation of both 18 U.S.C. §§ 371 and 1001. However, the defendants claim that the government has alleged no false statement in violation of section 1001; therefore, the charge is really a conspiracy in furtherance of a conspiracy, which is an impermissible pyramiding of charges.

Defendants' logic has a fatal flaw: the government has alleged a section 1001 violation. Section 1001 renders illegal intentional falsification and concealment, as well as false statements. The indictment clearly alleges intentional concealment of information that should have been reported to the Customs Service: "defendants . . . *conceal[ed]* their [foreign bank account] from the . . . United States Customs Service." (emphasis added).

This object is therefore valid in its entirety.

False Statements on Income Tax Returns

Defendants' success in attacking this object is predicated on the success of their attack on counts two through five, which contain the allegations of offenses under the false statement statute, 18 U.S.C. § 1001. Since we find these counts invalid, *infra*, this object is also invalid.

Transfer of Currency Between the United States and the Cayman Islands

This object is valid in its entirety.

Conclusion

Since in order to prosecute a conspiracy successfully the government must be able to point out two separate provisions, one making the act of conspiring a crime and another making the object of the conspiracy a crime, *see United States* v. *Meacham*, 626 F.2d 503, 507 (5th Cir. 1980), the government may not prosecute this conspiracy indictment under object three, which we have held invalid. However, the government may proceed on objects one, two, and four.

B. Counts Two through Five.

On their 1976 and 1977 income tax returns, the Hajecates concealed their offshore bank account by answering the following question "no": "Did you at any time during the taxable year have any interest in or signature or other authority over a bank, securities, or other financial account in a foreign country . . .? Yes ____ No____ If 'yes' attach Form 4683 (for definitions, see Form 4683)." Counts two through five indict the Hajecates for making false statements to a government agency in violation of 18 U.S.C. § 1001, and indict Eisenberg for aiding and abetting them in violation of 18 U.S.C. § 2.

The defendants attack counts two through five in several ways. We find merit in one and uphold the dismissal of these counts.

When the government properly exercised its discretion and chose to indict the Hajecates under the general statute making false statements a federal crime, 18 U.S.C. § 1001, instead of under 26 U.S.C. § 7206 of the Internal Revenue Code, which specifically penalizes false statements on tax returns, it of course invoked all the precedent under section 1001. Part of that precedent is the "exculpatory no" doctrine formulated in this circuit in *Paternostro* v. *United States*, 311 F.2d 298 (5th

Cir. 1962). In *Paternostro* this court reversed a conviction under section 1001 of a man who allegedly knowingly and willfully made a false statement to an IRS special agent. This false statement was made under oath during investigative questioning by the agent. After reviewing the origins and history of the statute and surveying the case law, *see id.* at 301-05, the court in *Pasternostro* derived principles to guide the application of section 1001; a section designed primarily to prevent fraudulently obtaining claims, privileges, or employment from the United States. For liability to attach under section 1001, the defendant must "aggressively and deliberately initiate . . . [a] positive or affirmative statement calculated to pervert the legitimate functions of Government." *Id.* at 305. "[M]ere negative responses to questions . . . by an investigating agent . . . not initiated by the appellant" are not actionable under section 1001. *Id.*

This doctrine has evolved and spawned considerable progeny. In *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974), this court dismissed a section 1001 indictment based on a taxpayer's signing of affidavits prepared by IRS officials that contained false statements. The taxpayer's signature was held to be essentially an "exculpatory no." In *United States* v. *Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978), we held an oral denial to a question put to a defendant by a Customs agent on the defendant's arrival in the United States to invoke the doctrine.

Since the Hajecates made "mere negative responses" and in no way made an "aggressive" or "deliberate positive" or affirmative statement," the question presented here is whether an "investigation" was occurring when the Hajecates answered that question on their tax returns. If so, the doctrine applies, and counts two through five fail.

The government claims that in all the "exculpatory no" cases an individual was singled out by a government official acting in a police capacity, e.g., an IRS agent, a Customs agent, magistrate, and so forth. This case is distinguishable, argues the

government, since the question on the tax form applied to all similarly situated individuals: the Hajecates were not singled out for investigation. Therefore, there was not coercion or intimidation of the Hajecates, no confrontation that threatened their rights. Finally, the government points to the Supreme Court's characterization of income tax return questions as "neutral on their face," "not directed at those 'inherently suspect of criminal activities,'" and not involving "the compulsion to incriminate.'" *Garner* v. *United States*, 424 U.S. 648, 660-61, 96 S.Ct. 1178, 1185-86, 47 L.Ed.2d 370 (1976).

However, defendants point out that this question is a novel one on the tax form: it has absolutely nothing to do with the calculation of one's taxes. Thus it is in a kind of limbo, not "investigative" in the traditional sense of the "exculpatory no" doctrine, yet obviously not administrative. Seeking to characterize the nature of this question, we turn to the statute authorizing it, 31 U.S.C. § 1121, the regulation implementing the statute, 31 C.F.R. § 103.24 (1977), and the legislative history undergirding both.

The statute declares:

> (a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:
>
> (1) The identities and addresses of the parties to the transaction or relationship.
>
> (2) The legal capacities in which the parties to the transactions or relationships are acting, and the identi-

> ties of the real parties in interest if one or more of the parties are not acting solely as principals.
>
> (3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.
>
> (b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of their records except in compliance with a subpoena or summons duly authorized and issued or as may otherwise be required by law.

The Secretary of the Treasury has elected to obtain these "reports" as part of the annual federal income tax returns required of all citizens:

> Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his Federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such person.

31 C.F.R. § 103.24 (1977). The Supreme Court has characterized the purpose of the Bank Secrecy Act of 1970, of which section 1121 is a part, as follows: "The express purpose of the Act is to require the maintenance of records, and the making of certain reports, which 'have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings.' " *California Bankers Association* v. *Shultz*, 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 L.Ed.2d 812 (1974), *quoting* 12 U.S.C. §§ 1829b(a)(2), 1951; 31 U.S.C. § 1051. This characterization is amply supported by the legislative history of the Act, where we find a presumption by Congress that secret foreign bank accounts and secret foreign financial institutions are inevitably linked to criminal activity in the United States. *See* H.R.Rep. No.975, 91st Cong., 2d Sess. 4-5 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 4394, 4397-98; S.Rep.No.1139, 91st Cong., 2d Sess. (1970); *Foreign Bank Secrecy and Bank*

Records: Hearings on H.R. 15073 Before the House Comm. on Banking and Currency, 91st Cong., 1st & 2d Sess. (1969-70); *Foreign Bank Secrecy: Hearings on S. 3678 & H.R. 15073 Before the Subcomm. on Financial Institutions of the Sen. Comm. on Banking and Currency*, 91st Cong., 2d Sess. (1970).

Based on the language of the statute, the Supreme Court characterization of it, and its legislative history, we are compelled to hold that this question must be classified as investigative and that therefore the "exculpatory no" doctrine applies here. We are quick to assuage the government's fears that this holding sanctions false answers to any tax return question. First, our holding covers only this question on a tax return as illuminated by the statute that permits it. We do not deal today with questions such as this on other government forms, questions that are administrative in nature and that are related to the computation of taxes, or questions with a different statutory basis. Further, this doctrine is *only* a creature of section 1001; the government may still prosecute fraudulent tax returns containing this question under the perjury statute of the IRC, 26 U.S.C. § 7206.

With these limitations on our holding, we believe it to be a correct application of the "exculpatory no" doctrine that will not hamper legitimate government functions.

C. Counts Six through Eleven.

Counts six through nine allege failures by the Hajecates to report transportation of currency on four dates in violation of 31 U.S.C. §§ 1059(1) and 1101. Counts ten and eleven deal with the Hajecates' failure to make annual reports of a foreign bank account in violation of 31 U.S.C. §§ 1121 and 1059(1).

Before the government can prosecute under 31 U.S.C. § 1059, it must allege that the violation was committed in furtherance of the commission of another violation of federal law or committed as part of a pattern of illegal activity involving transactions exceeding a specified dollar amount. In counts

six through eleven, the government alleges that the companion crimes necessary for a prosecution under section 1059 were violations of 18 U.S.C. §§ 371 and 1001. However, in none of these counts does the government provide the Hajecates with notice of the violations of federal law that they are accused of under sections 371 and 1001. While the implicit reference may be to the prior counts in the indictment, such an implicit reference does not satisfy the requirements of due process. Fed.R. Crim.P. 7(c) declares that allegations made in one count may be incorporated by reference in another count. But this court long ago held that while the specificity required in an indictment can be achieved by incorporation of another count, this incorporation must be express, not implicit. *See Davis* v. *United States*, 357 F.2d 438, 440 & n.2 (5th Cir.), *cert. denied*, 385 U.S. 927, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966).

This simple oversight by the government—failure to incorporate a prior count expressly—renders counts six through eleven defective as to the section 1059 allegations. These counts simply do not provide sufficient notice to the defendants of the sections 1001 and 371 crimes with which they are charged. *See Van Liew*, *supra*.

As to the sections 1101 and 1121 allegations in counts six through eleven, the record reveals that the defendants never made a *Davis*-based attack on them, and we do not pass on their sufficiency under *Davis*. In addition, we see no merit in the other defects the defendants have alleged. Therefore, counts six through eleven remain valid in part.

D. Conclusion.

To summarize, we uphold the dismissal of counts two through five in their entirety and the dismissal of portions of counts one and six through eleven by the district court but reverse the dismissal of (1) count one as to objects one, two, and four, and (2) portions of counts six through eleven.

III. THE HAJECATES' CROSS-APPEAL.

The Hajecates cross appeal the denial by the district court of dismissal of the entire indictment based on prosecutorial vindictiveness. The factual basis of this claim is that in 1979 two grand juries in the Southern District of Texas returned 84- and 29-count indictments against the Hajecates and others. These indictments were dismissed by the district court, but their dismissal was reversed and remanded by this court on appeal in *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). While the appeal from dismissal of these indictments was pending before this court, the government convened another grand jury and sought and obtained the indictment at issue here. The Hajecates immediately moved to dismiss the indictment, alleging that it was vindictive. The district court denied this motion, and the Hajecates took this appeal.

We need go no further than an examination of our jurisdiction to entertain this appeal in order to resolve this issue. The order from which the defendants Hajecate appeal is an interlocutory order, and this court has recently ruled that an interlocutory appeal does not lie from the denial of a pretrial motion to dismiss for prosecutorial vindictiveness. *United States* v. *Gregory*, 656 F.2d 1132 (5th Cir. 1981). We are bound by *Gregory* and therefore have no jurisdiction to entertain this cross appeal by the Hajecates.

APPEAL AFFIRMED IN PART AND REVERSED IN PART AND REMANDED; CROSS-APPEAL DISMISSED.

GARWOOD, Circuit Judge, concurring in part and dissenting in part.

I concur in the dismissal of the Hajecates' cross-appeal, and join in all of the majority opinion related thereto.

I likewise agree with the majority's holdings as to counts six through eleven and join in so much of the opinion as deals with those counts.

However, the majority, having held counts six through eleven valid in part and invalid in part, nevertheless holds the related portions (the second and fourth sets of object offenses) of the conspiracy count (count one) entirely valid. I respectfully dissent from this holding. I would hold these object offense allegations invalid to the extent they seek to charge that the violations of 31 U.S.C. §§ 1101 and 1121 were "in furtherance of the commission of violations of" 18 U.S.C. §§ 371 and 1001.

The "in furtherance" allegations are obviously designed to convert these object offenses from a 31 U.S.C. § 1058 misdemeanor into a section 1059(1) felony. Although count one expressly incorporates the remaining counts, nowhere in the entire indictment is the conduct allegedly constituting the "in furtherance" offenses identified in even the most general way. Neither on brief nor on argument does the government favor us with *any* such identification. The majority suggests that the conduct constituting the "in furtherance" offenses is concealment of the foreign bank account from the Customs Service. So far as I am aware, the only obligations to disclose such accounts are those imposed under section 1121, or at least under other sections of the 1970 Bank Secrecy Act, Pub.L.91-508, of which sections 1058, 1059, 1101, and 1121 are a part. Accordingly, such an offense would not be an "other violation of Federal law" as required by section 1059(1). Nor does dragging the same conduct in through the back door by labeling it a violation of 18 U.S.C. §§ 371 and 1001 enhance the government's position in this regard. So far as I am aware, the offense of conspiring to commit a conspiracy is unknown to the federal criminal law. Moreover, "defrauding" the government with respect to performance of its functions under the Bank Secrecy Act, or concealing (or conspiring to conceal) something within the jurisdiction of the Treasury Department under such Act, cannot properly constitute an "enhancing" offense under section 1059(1). The contrast between subsections (1) and (2) of section 1059 makes it plain that the former applies only to "activity not involving violations of the Bank Secrecy Act." *See United*

States v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979). Accordingly, I would hold the second and fourth sets of object offenses under count one valid to the extent of charging section 1058 misdemeanor violations of sections 1101 and 1121, and invalid to the extent of charging section 1059(1) felonies.

The majority upholds the validity of the first object offense of the conspiracy count, defrauding the United States by impeding the Internal Revenue Service in the "assessment, and collection of income taxes." I respectfully disagree and would hold this portion of count one invalid as being excessively vague and general by reason of its failure to give any indication of whose income taxes are involved. Although the remaining counts charge the substantive violations which form the second and subsequent sets of object offenses in the conspiracy count, and are expressly incorporated in it, none of the remaining counts supports the first object offense in count one. The government in its brief on appeal took the position that the relevant taxes are those of Tom and Mick Hajecate, and the majority adopts this construction of the indictment. However, in its bill of particulars the government took the position that this portion of count one also related to the income taxes of Uni Oil, Inc., Hajecate Oil and Gas, Inc., MAPCO, and H.C. Iran, Ltd. On oral argument government counsel, when questioned about this discrepancy, disavowed the position taken in the brief, and said the bill of particulars was correct, except that the count did not relate to MAPCO's income taxes.

As reproduced (and apparently slightly reduced in size) in the government's brief, count one is approximately nine and a half pages in length, and is extremely complex and confusing. While certainly it should be read as a whole, nevertheless, when so read it fails to state, or even clearly infer, whose income taxes are involved. One of the means alleged to effectuate the conspiracy is "engaging in a 'silver straddle' in June 1977 in order to create an apparent paper loss to offset *the profits of MAPCO*" (emphasis added) in the event the government discovered the Hajecates' interest in and control over MAPCO's secret bank account. This suggests a concealment of

MAPCO income; yet, the government has twice told us, and the majority agrees, that MAPCO's taxes are not involved. Another alleged means of the conspiracy was a sham bank loan to Hajecate Oil and Gas, Inc. and Tom and Mick Hajecate, which suggests that the former's taxes may be included. However, the government's intermediate position, with which the majority agrees, is that such corporation's taxes are not in issue.

The conspiracy alleged in the indictment covers a three-year period, and it seems to me to be vital for double jeopardy purposes to know whose taxes the indictment charges that defendants conspired to defraud the government of. If, for example, the indictment does not charge a conspiracy during that time to defraud the government of MAPCO's or Uni Oil's taxes, does it protect defendants against a subsequent charge for such offense? The government has taken three different positions regarding the meaning of the indictment in this connection, and on each occasion the government's action appears to have been deliberate and considered and taken in full awareness of its significance. Under the circumstances, count one fails to adequately identify the first object offense of the conspiracy. Accordingly, I would hold this portion of count one invalid.

The majority holds counts two, three, four, and five invalid under the "exculpatory no" doctrine. The offenses charged in these counts also constitute the third set of object offenses under count one, and the majority, for the same reason, also holds this portion of count one invalid. I respectfully disagree with these holdings, as I would not extend the "exculpatory no" doctrine to answering this or similar questions on income tax returns. I fully agree with the majority that the question is investigatory and has nothing to do with the calculation or determination of income taxes. Nevertheless, the question appears on virtually all tax returns, and is not directed at any selected group or groups thought more likely than others to include those engaging in illegal activities. Moreover, while the question is asked for an investigatory purpose, the manner

and setting in which the question is both asked and answered is distinctly *not* investigatory, intimidating, or confrontational. The respondent is free to take his or her time and to consult legal or tax advisors, all without any knowledge on the part of the government, before answering (or declining to answer), and of course the answer need not be given in person. The "exculpatory no" doctrine is a judicially created exception to the statutory law, and I do not think it should be extended so as to exculpate, under these circumstances, the making of a deliberately false statement on such an official document filed with the government.

One matter remains to be considered respecting counts two through five and the related portion of the conspiracy count. The defendants maintain that these offenses should have been charged under 26 U.S.C. § 7206, which denounces the willful making of a tax return known to contain a false statement as to a material matter. As defendants correctly point out, this section of the Internal Revenue Code of 1954 was enacted subsequently to 18 U.S.C. § 1001, the latest version of which was enacted in 1948. Section 7206 forms a part of chapter 75 of the 1954 Code which was designed to incorporate in one place the previously scattered criminal provisions dealing with violations of the Internal Revenue Code. *See* H.R.Rep.No.1337, 83d Cong., 2d Sess. *reprinted in* [1954] U.S.Code Cong. & Ad. News 4017, 4135, 4573. In the Internal Revenue Code Congress has provided a carefully graduated scheme of criminal penalties. For example, willful tax evasion is punishable by imprisonment of up to five years, 26 U.S.C. § 7201, while willfully failing to file a return or pay the tax due is punishable by imprisonment for up to only one year, 26 U.S.C. § 7203. Making an intentional misstatement of material fact on a return—regardless of any intention to evade taxes—is an offense of intermediate severity, the maximum prison term being three years, 26 U.S.C. § 7206. Significantly, the House version of section 7206 provided for a penalty of up to five years' imprisonment and a $10,000 fine, while the Senate version, which was ultimately adopted, reduced the maximum to

three years and $5,000. *Compare* H.R.Rep.No.1337, *supra* at 4573 *with* S.Rep.No.1622, 83d Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621, 5252 and H.R.Rep. No. 2543 (Conference Rep.), 83 Cong., 2d Sess., reprinted in [1954] U.S. Code Cong. & Ad. News 5280, 5344.

Proof of a violation of 26 U.S.C. § 7206(1) necessarily encompasses *all* elements required to establish a violation of 18 U.S.C. § 1001 (although, of course, the converse is not true). Yet the maximum penalty for violation of section 1001 is confinement for five years and a $10,000 fine, the very penalty which Congress rejected as excessive for a violation of section 7206, the later and more specific statute.

In these circumstances, I believe there is a substantial question as to whether section 1001 can properly be used to procure a higher penalty for what is in fact a violation of section 7206. *See Busic* v. *United States*, 446 U.S. 398, 405-07, 100 S.Ct. 1747, 1752-53, 64 L.Ed.2d 381, 388-90 (1980); *Simpson* v. *United States*, 435 U.S. 6, 15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70, 78 (1978); *United States* v. *Meacham*, 626 F.2d 503, 508 n. 6 (5th Cir. 1980); *United States* v. *Beer*, 518 F.2d 168 (5th Cir. 1975).[1] One is indeed reluctant to hold that Congress simply

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[1] On the other hand, a similar contention favoring prosecution under the 1939 Internal Revenue Code analogue to section 7206 was rejected in *Cohen* v. *United States*, 201 F.2d 386, 392-93 (9th Cir. 1953) (note, however, that under the 1939 Code the penalty for a willfully false return was five years and a $2,000 fine, and there was no indication of a specific congressional intention to reduce the maximum sentence). In *United States* v. *Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the prosecution was under section 1001 but the question of whether it should have been under section 7206(1) was neither raised nor discussed. In *United States* v. *Knox*, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969), it does not appear whether the wagering tax return form was such as would be required for prosecution under section 7206(1). *See also United States* v. *Carter*, 526 F.2d 1276 (5th Cir. 1976) (however, the opinion seems to view each of the statutes involved as requiring proof of some element which the other did not).

wasted its time by reducing the maximum penalty under section 7206.

Nevertheless, I do not believe that this problem goes to the sufficiency of the indictment. Counts two through five sufficiently allege facts constituting a violation of 26 U.S.C. § 7206. Defendants do not claim otherwise—indeed they claim that an offense *is* alleged under section 7206.[2] Under the express provisions of Rule 7(c)(3), Fed.R.Cr.P., citation of the wrong statutory provision is not grounds for dismissal of the indictment "if the error . . . did not mislead the defendant to his prejudice." Here there is no assertion that any of the defendants were prejudicially misled, nor does the record suggest such. *See United States* v. *Welch*, 656 F.2d 1039, 1059 n. 26 (5th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982); *United States* v. *Duncan*, 598 F.2d 839,

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[2] Eisenberg is charged in counts two and three with aiding and abetting Tom and Mick Hajecate in the offenses respecting their 1977 income tax returns. Since the requisite mental state is alleged as to the Hajecates respectively, as well as to Eisenberg, Eisenberg would be chargeable under 18 U.S.C. § 2(a) for aiding and abetting the Hajecates' violation of 26 U.S.C. § 7206(1). Clearly 18 U.S.C. § 2(a) is not in terms restricted to offenses denounced in Title 18, and there is no reason to deny its application to the offenses denounced in Title 26. *See, e.g., United States* v. *Johnson*, 319 U.S. 503, 514-15, 63 S.Ct. 1233, 1238-39, 87 L.Ed. 1546, 1555-56 (1943). Eisenberg could alternatively be charged under 26 U.S.C. § 7206(2). The penalty in each instance would be the same.

While it is not expressly alleged that the returns were signed under penalties of perjury, it is alleged that in each instance the return signed was the "Individual Income Tax Return, Form 1040" for the respective years 1976 and 1977. These official forms, of which judicial knowledge can be taken, contain a printed declaration that the return is made under the penalties of perjury, and hence satisfy the requirement in this regard of section 7206(1).

839, 848 n. 4, 854 n. 11 (4th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).[3]

Accordingly, I would not dismiss any of counts two through five, nor that part of count one relating to these substantive counts.

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[3] There is no question of a guilty plea having been taken under a misapprehension of the maximum sentence, nor, of course, has the sentencing stage been reached.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2130

UNITED STATES OF AMERICA, *Plaintiff-Appellant Cross Appellee,*

versus

THOMAS M. HAJECATE and THOMAS H. HAJECATE, *Defendants-Appellees Cross Appellants,*

LANCE EISENBERG, *Defendant-Appellee.*

Appeal From The United States District Court For The Southern District Of Texas

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U.S. COURT OF APPEALS
FILED
November 1, 1982
GILBERT E. GANUCHEAU
CLERK

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/23/82, 5 Cir., 198__, ____ F.2d ____).

(November 1, 1982)

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local

Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs, Jr.
THOMAS GIBBS, JR.
United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
LANCE EISENBERG,	)	**Criminal No. H-81-09S**
THOMAS M. HAJECATE, a/k/a	)	
Mick Hajecate,	)	
THOMAS H. HAJECATE, a/k/a	)	
Tom Hajecate	)	

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 27, 1981
JESSE E. CLARK, CLERK
BY DEPUTY: L. FOWLER

ORDER CONCERNING MOTIONS

This matter having come on for hearing on pretrial motions on March 18, 1981, and the Court having considered all the pleadings, the oral arguments of the attorneys, and the testimony of witnesses, makes the following Order:

1. On Thomas H. Hajecate's and Thomas M. Hajecate's Motion to Dismiss for prosecutorial vindictiveness, the Court finds Richard Sauber of the Department of Justice and Assistant United States Attorney James Ezer to be credible witnesses, and accepts their version of the facts. The Court accepts the Government's theory of the law. Said motion is therefore DENIED, this being an appealable Order.

2. On all Defendants' motions to dismiss the indictment as invalid on its face, there are no factual matters presented. The Court accepts the Defendants' theory of the law in every

respect. All counts of the indictment are DISMISSED, this being an appealable Order.

/s/ Woodrow Seal
WOODROW SEAL
UNITED STATES DISTRICT JUDGE

DATE: 3-27-81

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By L. Fowler
Deputy Clerk

APPROVED AS TO FORM:
/s/ Joe H. Reynolds
JOE H. REYNOLDS
Counsel for LANCE EISENBERG

/s/ Thano Dameris
THANO DAMERIS
/s/ Michael E. Tigar
MICHAEL E. TIGAR
Counsel for THOMAS H. HAJECATE
and THOMAS M. HAJECATE

/s/ John T. Johnson
JOHN T. JOHNSON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-81-09

UNITED STATES OF AMERICA,

VS.

LANCE EISENBERG, THOMAS M. HAJECATE, A/K/A MICK HAJECATE, THOMAS H. HAJECATE, A/K/A TOM HAJECATE

PROCEEDINGS

March 18, 1981

BE IT REMEMBERED that on the 18th day of March, 1981, the above-numbered and entitled cause came on for hearing before the Honorable Woodrow Seals, Judge of the United States District Court for the Southern District of Texas, Houston Division, whereupon, the following proceedings were had and testimony adduced.

* * *

The Court: * * * On the Defendant's Eisenberg and the brothers Hajecate, on their motions to dismiss because the indictment is invalid on its face, there was no facts there to pass on, but I accept their theory of the law of the defendants in every respect, and I dismiss all the indictments, and that's an appealable order, too.

So, it's not necessary for me to hear anything else. Thank you very much.

I will ask the parties to get together and draw up a joint order to that effect and file it with the clerk in the morning, and I would suggest the Government immediately give notice of appeal, because the Court of Appeals wants us to expedite criminal cases, and I suggest you immediately give notice of appeal on the motion, and I will rule on yours.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	
	)	
LANCE EISENBERG	)	**Criminal No. H-81-09**
THOMAS M. HAJECATE, a/k/a Mick Hajecate	)	
THOMAS H. HAJECATE, a/k/a Tom Hajecate	)	

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JAN 21, 1981
JESSE E. CLARK, CLERK
BY DEPUTY J. KETELSEN

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

1. At all times material to this Indictment, and specifically from on or about January 1, 1976, continuing to on or about January 1, 1979:

a. H. C. Iran, Ltd., was a Cayman Islands, British West Indies entity utilized and controlled by THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

b. Mid-Atlantic Petroleum Company, Ltd., hereinafter referred to as MAPCO, was a Cayman Islands, British West Indies, entity utilized and controlled by THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

c. H. C. Iran, Ltd., and MAPCO were affiliates of Uni Oil, Inc., and Hajecate Oil and Gas, Inc.

d. Uni Oil, Inc., Houston, Texas, a Texas corporation owned and controlled by THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, was engaged in the oil business and other related activities.

e. Hajecate Oil and Gas, Inc., a Texas corporation owned and controlled by THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, was engaged in the oil business and other related activities.

f. Defendant THOMAS M. HAJECATE, also known as Mick Hajecate, was the president and a director of Uni Oil, Inc., and was an officer, agent, and person with an interest in and other authority over H. C. Iran, Ltd., MAPCO, and Hajecate Oil and Gas, Inc.

g. Defendant THOMAS H. HAJECATE, also known as Tom Hajecate, was the secretary-treasurer and a director of Uni Oil, Inc., and an officer, agent, and person with an interest in and other authority over H. C. Iran, Ltd., MAPCO, and Hajecate Oil and Gas, Inc.

h. International Business Transactions, Ltd., was a Bahamian corporation located in Nassau, Bahama Islands.

i. International Business Transactions, Ltd., was owned by Columbus Trust Company, Ltd., which is also located in Nassau, Bahama Islands.

j. Donald Bruce Aberle was the president and a director of International Business Transactions, Ltd., and Columbus Trust Company, Ltd.

k. Defendant LANCE EISENBERG was a tax attorney licensed to practice law within the State of Florida, and he negotiated and transacted business on behalf of Uni Oil, Inc., Hajecate Oil and Gas, Inc., MAPCO, Columbus Trust Company, Ltd., International Business Transactions, Ltd., THOM-

AS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and Donald Bruce Aberle.

1. MAPCO was a "shell" company used by THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, and in which name was established a bank account at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island.

2. Beginning on or about January 1, 1976 and continuously thereafter up to and including January 1, 1979 in Houston, Texas; Miami, Florida; and elsewhere, within and without the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG, did unlawfully, knowingly, and willfully conspire, confederate, combine, and agree together and with each other and with divers other persons, to the grand jurors known and unknown, to commit the following offenses against the United States:

a. To defraud the United States by impeding, impairing, obstructing, and defeating the lawful function of the United States Treasury Department, Internal Revenue Service, in the ascertainment, computation, assessment, and collection of income taxes;

b. To defraud the United States by impeding, impairing, obstructing, and defeating the lawful function of the United States Treasury Department, United States Customs Service, in the collection, maintenance, and distribution of records pertaining to covered financial transactions of United States persons with foreign financial institutions in furtherance of the commission of violations of Title 18, United States Code, Section, 371 and Section 1001, in violation of Title 31, United States Code, Section 1121;

c. To knowingly and willfully make and cause to be made false and fraudulent statements and representations on

the 1976 and 1977 Individual Income Tax Returns, Forms 1040, of THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, in violation of Title 18, United States Code, Section 1001; and

d. To knowingly and willfully transport and cause to be transported to Houston, Texas from Georgetown, Grand Cayman Island monies in amounts exceeding Five Thousand and No/100 ($5,000.00) Dollars in United States currency without reporting the transportation of the monies to the United States Customs Service in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001, in violation of Title 31, United States Code, Section 1101.

3. The grand jury further charges that the unlawful conspiracy, confederation, combination, and agreement was to be accomplished by the following means and methods:

a. It was a part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, would use the "shell" company known as MAPCO to establish and maintain a secret bank account at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, for hiding, concealing, and holding receipts of money actually derived from the business activities of THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, Uni Oil, Inc., Hajecate Oil and Gas, Inc., and H. C. Iran, Ltd., in order to conceal said business activities and receipts of money from the Internal Revenue Service.

b. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, would obtain and use the services of officers, directors, and employees of the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, as agents and directors of MAPCO in order to conceal their interest in and

authority over MAPCO bank account from the Internal Revenue Service and the United States Customs Service.

c. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would devise a scheme to attempt to transfer monies in the approximate amount of One Million Five Hundred Thousand and No/100 ($1,500,000.00) Dollars from the secret MAPCO bank account in the Cayman Islands to the United States for the use and benefit of THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, in a manner that would prevent the Internal Revenue Service and the United States Customs Service from discovering the source of the funds.

d. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would attempt to prevent the Internal Revenue Service and the United States Customs Service from discovering the true source of the monies by causing the transaction to appear to be a legitimate loan of One Million Five Hundred Thousand and No/100 ($1,500,000.00) Dollars from the Southeast First National Bank of Miami, Florida, to Hajecate Oil and Gas, Inc., THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

e. It was a further part of the conspiracy that in order to conceal MAPCO as the true source of the One Million Five Hundred Thousand and No/100 ($1,500,000.00) Dollars, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would cause Nine Hundred Five Thousand and No/100 ($905,000.00) Dollars and Six Hundred Thousand and No/100 ($600,000.00) Dollars to be wire transferred from the secret MAPCO bank account at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand

Cayman Island, to International Business Transactions, Ltd., Nassau, Bahama Islands.

f. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would cause the amounts of Nine Hundred Five Thousand and No/100 ($905,000.00) Dollars and Six Hundred Thousand and No/100 ($600,000.00) Dollars that were wire transferred to International Business Transactions, Ltd., to be used to purchase two certificates of deposits from the Southeast First National Bank of Miami, Florida in the amounts of Nine Hundred Thousand and No/100 ($900,000.00) Dollars and Six Hundred Thousand and No/100 ($600,000.00) Dollars.

g. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would cause the two certificates of deposits to be pledged as security for loans of Nine Hundred Thousand and No/100 ($900,000.00) Dollars and Six Hundred Thousand and No/100 ($600,000.00) Dollars made by the Southeast First National Bank of Miami, Florida to Hajecate Oil and Gas, Inc., THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

h. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would engage in a "Silver Straddle" in June, 1977 in order to create an apparent paper loss to offset the profits of MAPCO in the event the Internal Revenue Service should discover THOMAS M. HAJECATE's, also known as Mick Hajecate, and THOMAS H. HAJECATE's, also known as Tom Hajecate, interest in and other authority over the secret MAPCO bank account in the Cayman Islands.

i. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and

THOMAS H. HAJECATE, also known as Tom Hajecate, would withdraw United States currency from the secret MAPCO bank account and bring the currency into the United States in amounts in excess of Five Thousand and No/100 ($5,000.00) Dollars without properly reporting the transportations of the currency to the United States Customs Service as required by statute and regulations.

j. It was a further part of the conspiracy that defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG would make false statements and representations on the 1976 and 1977 Individual Income Tax Returns, Forms 1040, of THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, regarding their interest in and other authority over the secret MAPCO bank account.

4. In furtherance of the conspiracy and to effect the objects thereof, the defendants did and caused to be done the acts set forth in Counts Two though Eleven of this Indictment.

5. In addition to the overt acts charged in paragraph four, the grand jury further charges that during the existence of the conspiracy, the defendants did the following overt acts, within and without the Southern District of Texas, and within the jurisdiction of this Court:

OVERT ACTS

1. On or about June 21, 1976, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, opened a bank account in the name of H. C. Iran, Ltd., P.O. Box 36158, Houston, Texas 77036, at the Clinton National Bank, Clinton, Iowa.

2. On or about June 21, 1976, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, signed a purchase order to purchase a Cessna Citation airplane for the sum of Five Hundred Ninety Thousand and No/100 ($590,000.00) Dollars, in the name of H. C. Iran, Ltd., P.O. Box 694, Georgetown, Grand Cayman, British West Indies.

3. On or about September 19, 1976, defendant THOMAS H. HAJECATE, also known as Tom Hajecate, traveled to the Cayman Islands by aircraft from Houston, Texas, and met with defendant LANCE EISENBERG.

4. On or about October 7, 1976, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, traveled from Houston, Texas via Cancun, Mexico, to the Cayman Islands by aircraft, and met with defendant LANCE EISENBERG.

5. On or about November 22, 1976, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, met with defendant LANCE EISENBERG at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island.

6. On or about January 18, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, traveled from Houston, Texas to the Cayman Islands by aircraft and met with defendant LANCE EISENBERG.

7. On or about February 16, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and LANCE EISENBERG traveled from the Cayman Islands by aircraft to Miami, Florida.

8. On or about March 14, 1977, defendant LANCE EISENBERG wrote a letter to the Southeast First National Bank of Miami regarding a loan transaction for THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

9. On or about March 22, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, caused the bank officers at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, to wire transfer Nine Hundred Five Thousand and No/100 ($905,000.00) Dol-

lars from the MAPCO bank account to International Business Transactions, Ltd., in Nassau, Bahama Islands.

10. On or about March 23, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG, caused International Business Transactions, Ltd., to purchase Certificate of Deposit Number 261200 in the amount of Nine Hundred Thousand and No/100 ($900,000.00) Dollars at the Southeast First National Bank of Miami.

11. On or about March 28, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, wrote a letter to the Southeast First National Bank of Miami regarding a Nine Hundred Thousand and No/100 ($900,000.00) loan.

12. On or about March 29, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, caused the Southeast First National Bank of Miami to wire transfer Eight Hundred Sixty Eight Thousand Fifty-Six and Twenty-Five/100 ($868,056.25) Dollars, from Miami, Florida, to the bank account of Hajecate Oil and Gas, Inc., at the First City National Bank, Houston, Texas.

13. On or about April 16, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG traveled from Nassau, Bahama Islands to Houston, Texas via Miami, Florida, by aircraft.

14. On or about May 17, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, caused the bank officers at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, to wire transfer Six Hundred Thousand and No/100 ($600,000.00) Dollars from the MAPCO bank account to International Business Transactions, Ltd., Nassau, Bahama Islands.

15. On or about May 26, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, traveled from Houston, Texas, by aircraft to the Cayman Islands and met with defendant LANCE EISENBERG at the Canadian Imperial Bank of Commerce Trust Company, Ltd.

16. On or about June 2, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG caused International Business Transaction, Ltd., to purchase certificate of deposit number 62241 in the amount of Six Hundred Thousand and No/100 ($600,000.00) Dollars at the Southeast First National Bank of Miami.

17. On or about June 7, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, caused the Southeast First National Bank of Miami to wire transfer approximately Six Hundred Thousand ($600,000.00) Dollars to Hajecate Oil and Gas, Inc., in Houston, Texas.

18. On or about July 19, 1977, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and LANCE EISENBERG traveled to Nassau, Bahama Islands by aircraft from Miami, Florida.

19. On or about October 5, 1977, defendant LANCE EISENBERG wrote a letter to the Southeast First National Bank of Miami regarding a guarantee of a loan in the amount of One Million Five Hundred Thousand and No/100 ($1,500,000.00) Dollars to THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate.

20. On or about April 11, 1978, defendants THOMAS M. HAJECATE, also known as Mick Hajecate, and THOMAS H. HAJECATE, also known as Tom Hajecate, traveled from Georgetown, Grand Cayman Island, to Houston, Texas, by aircraft.

(Violation: Title 18, United States Code, Section 371)

COUNT TWO

On or about the 15th day of October, 1977, within the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, THOMAS H. HAJECATE, also known as Tom Hajecate, defendant herein, aided and abetted by LANCE EISENBERG, defendant herein, did willfully and knowingly make and willfully and knowingly cause to be made a material false and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, in that the defendant THOMAS H. HAJECATE, also known as Tom Hajecate, stated and represented on his Individual Income Tax Return, Form 1040, for the year 1976, that he did not have any interest in or signature or other authority over a bank or other financial account in a foreign country, which Form 1040 the defendant THOMAS H. HAJECATE, also known as Tom Hajecate, prepared, subscribed, and mailed and caused to be prepared, subscribed, and mailed to the Internal Revenue Service, whereas, as the defendants, THOMAS H. HAJECATE, also known as Tom Hajecate, and LANCE EISENBERG, then and there knew and believed, the defendant THOMAS H. HAJECATE, also known as Tom Hajecate, had an interest in and authority over the bank and financial account of the entity known as Mid-Atlantic Petroleum Company, Ltd., also known as "MAPCO", located at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, British West Indies.

(Violation: Title 18, United States Code, Sections 2 and 1001)

COUNT THREE

On or about the 14th day of October, 1977, within the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, THOMAS M. HAJECATE, also known as Mick Hajecate, defendant herein, aided and abetted by LANCE EISENBERG, defendant herein, did willfully and knowingly make and willfully and knowingly cause to be made a material false and fraudulent statement and representation in a matter

within the jurisidction of the Internal Revenue Service, an agency of the United States, in that the defendant, THOMAS M. HAJECATE, also known as Mick Hajecate stated and represented on his Individual Income Tax Return, Form 1040, for the year 1976, that he did not have any interest in or signature or other authority over a bank or other financial account in a foreign country, which Form 1040 the defendant, THOMAS M. HAJECATE, also known as Mick Hajecate, prepared, subscribed, and mailed and caused to be prepared, subscribed, and mailed to the Internal Revenue Service, whereas, as the defendants, THOMAS M. HAJECATE, also known as Mick Hajecate, and LANCE EISENBERG, then and there knew and believed, the defendant, THOMAS M. HAJECATE, also known as Mick Hajecate, had an interest in and authority over the bank and financial account of the entity known as Mid-Atlantic Petroleum Company, Ltd., also known as "MAPCO", located at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, British West Indies.

(Violation: Title 18, United States Code, Sections 2 and 1001)

COUNT FOUR

That on or about the 20th day of October, 1978, within the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, THOMAS H. HAJECATE, also known as Tom Hajecate, defendant herein, did willfully and knowingly make and willfully and knowingly cause to be made a material false and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, in that the defendant, THOMAS H. HAJECATE, also known as Tom Hajecate, stated and represented on his Individual Income Tax Return, Form 1040, for the year 1977, that he did not have any interest in or signature or other authority over a bank or other financial account in a foreign country, which Form 1040 the defendant, THOMAS H. HAJECATE, also known as Tom Hajecate, prepared, subscribed, and mailed and caused to be prepared, subscribed, and mailed to the Internal Revenue Service, whereas, as he

then and there knew and believed, he had an interest in and authority over the bank and financial account of the entity known as Mid-Atlantic Petroleum Company, Ltd., also known as "MAPCO", located at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, British West Indies.

(Violation: Title 18, United States Code, Section 1001)

COUNT FIVE

That on or about the 20th day of October, 1978, within the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, THOMAS M. HAJECATE, also known as Mick Hajecate, defendant herein, did willfully and knowingly make and willfully and knowingly cause to be made a material false and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States, in that the defendant, THOMAS M. HAJECATE, also known as Mick Hajecate, stated and represented on his Individual Income Tax Return, Form 1040, for the year 1977, that he did not have any interest in or signature or other authority over a bank or other financial account in a foreign country, which Form 1040 the defendant, THOMAS M. HAJECATE, also known as Mick Hajecate, prepared, subscribed, and mailed, and caused to be prepared, subscribed, and mailed to the Internal Revenue Service, whereas, as he then and there knew and believed, he had an interest in and authority over the bank and financial account of the entity known as Mid-Atlantic Petroleum Company, Ltd., also known as "MAPCO", located at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island, British West Indies.

(Violation: Title 18, United States Code, Section 1001)

COUNT SIX

On or about November 22, 1976, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, did knowingly and willfully

transport and caused to be transported from Georgetown, Grand Cayman Island, a place outside the United States, to Houston, Texas within the Southern District of Texas and within the jurisdiction of this Court, monetary instruments in an approximate amount of Fifteen Thousand and No/100 ($15,000.00) Dollars in United States currency, without filing with the United States Customs Service a report as required by Title 31, United States Code, Section 1101, in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Section 1059(1) and Section 1101)

COUNT SEVEN

On or about January 19, 1977, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, aided and abetted by defendant THOMAS H. HAJECATE, also known as Tom Hajecate, did knowingly and willfully transport and caused to be transported from Georgetown, Grand Cayman Island, a place outside the United States, to Houston, Texas, within the Southern District of Texas and within the jurisdiction of this Court, monetary instruments in an approximate amount of Eleven Thousand and No/100 ($11,000.00) Dollars in United States currency without filing with the United States Customs Service a report as required by Title 31, United States Code, Section 1101, in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Sections 1059(1) and 1101, and Title 18, United States Code, Section 2)

COUNT EIGHT

On or about February 15, 1977, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, did knowingly and willfully transport and cause to be transported from Georgetown, Grand Cayman Island, a place outside the United States, to Houston, Texas, within the Southern District of Texas and

within the jurisdiction of this Court, monetary instruments in an approximate amount of Twenty Thousand and No/100 ($20,000.00) Dollars in United States currency without filing with the United States Customs Service a report as required by Title 31, United States Code, Section 1101, in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Sections 1059(1) and 1101)

COUNT NINE

On or about May 26, 1977, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, aided and abetted by defendant THOMAS H. HAJECATE, also known as Tom Hajecate, did knowingly and willfully transport and caused to be transported from Georgetown, Grand Cayman Island, a place outside the United States, to Houston, Texas, within the Southern District of Texas and within the jurisdiction of this Court, monetary instruments in an approximate amount of Twenty Thousand and No/100 ($20,000.00) Dollars in United States currency without filing with the United States Customs Service a report as required by Title 31, United States Code, Section 1101, in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Section 1059(1) and Section 1101, and Title 18, United States Code, Section 2)

COUNT TEN

During calendar year 1977, defendant THOMAS M. HAJECATE, also known as Mick Hajecate, a resident of Houston, Texas, maintained a relationship and conducted business with a foreign financial institution by maintaining a bank account at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island; that by virtue of said facts, THOMAS M. HAJECATE, also known as Mick Hajecate, was required by law to file an annual Report of Foreign Bank

and Financial Accounts (Form 90-22.1) with the Secretary of the Treasury or his designee on or before July 1, 1978, at Houston, Texas or Washington, D.C., setting forth in detail the identities of the parties to the transaction and their addresses; the legal capacities in which the parties to the transaction were acting and the identities of the real parties at interest if one or more of the parties were not acting as principals; and a description of the transaction or relationship including the amounts of money, credit, or other property involved; that well knowing all of the foregoing facts on or about July 1, 1978 in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, THOMAS M. HAJECATE, also known as Mick Hajecate, did knowingly and willfully fail to make said Report of Foreign Bank and Financial Accounts to the Secretary of the Treasury or his designee or to any proper officer of the United States in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Sections 1121 and 1059(1))

COUNT ELEVEN

During calendar year 1977, defendant THOMAS H. HAJECATE, also known as Tom Hajecate, a resident of Houston, Texas, maintained a relationship and conducted business with a foreign financial institution by maintaining a bank account at the Canadian Imperial Bank of Commerce Trust Company, Ltd., Georgetown, Grand Cayman Island; that by virtue of said facts, THOMAS H. HAJECATE, also known as Tom Hajecate, was required by law to file an annual Report of Foreign Bank and Financial Accounts (Form 90-22.1) with the Secretary of the Treasury or his designee on or before July 1, 1978, at Houston, Texas or Washington, D.C., setting forth in detail the identities of the parties to the transaction and their addresses; the legal capacities in which the parties to the transaction were acting and the identities of the real parties at interest if one or more of the parties were not acting as principals; and a descrip-

tion of the transaction or relationship including the amounts of money, credit, or other property involved; that well knowing all of the foregoing facts on or about July 1, 1978 in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court THOMAS H. HAJECATE, also known as Tom Hajecate, did knowingly and willfully fail to make said Report of Foreign Bank and Financial Accounts to the Secretary of the Treasury or his designee or to any proper officer of the United States in furtherance of the commission of violations of Title 18, United States Code, Section 371 and Section 1001.

(Violation: Title 31, United States Code, Sections 1121 and 1059(1))

A TRUE BILL:

/s/ Ron Van Silder

RON VAN GILDER
Foreman of the Grand Jury

Carl Walker, Jr.
CARL WALKER, JR.
United States Attorney

/s/ By: John T. Johnson
JOHN T. JOHNSON
Asst. U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-81-09S

UNITED STATES OF AMERICA,

v.

LANCE EISENBERG, *et al.*

GOVERNMENT'S VOLUNTARY ANSWERS TO DEFENDANT EISENBERG'S BILL OF PARTICULARS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the United States of America, and files these Answers to forty-seven (47) of the Defendant Lance Eisenberg's Bill of Particulars, and would show this Honorable Court as follows:

* * *

21. *Paragraph 2.a:* The names and addresses of each taxpayer whose income taxes the IRS was impeded, impaired, obstructed, and defeated in ascertaining, computing, assessing, and collecting.

ANSWER: Thomas H. Hajecate, Thomas M. Hajecate, Uni Oil, Inc., Hajecate Oil and Gas, Inc., MAPCO, H. C. Iran, Ltd.

BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (Pages 35-36)

* * *

In addition, the defendants argued (R. 68-69) that the indictment failed to state an offense with respect to the first object of the conspiracy because it failed to allege whose taxes the Internal Revenue Service had been obstructed from ascertaining. It was, however, unnecessary to identify a particular tax liability at issue. *United States* v. *Enstam*, *supra* and *United States* v. *Klein*, *supra*. Accord *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); *Dennis* v. *United States*, 384 U.S. 855, 861 (1966). At all events, contrary to the defendants' claim, a fair reading of the indictment makes it clear that the Internal Revenue Service was obstructed in ascertaining the Hajecates' taxes. (See, e.g., Paragraphs 2.c, 3.a, 3.c, and 3.j of Count One, Appendix, *infra* at pp. 3a, 4a, 6a-7a.)

BRIEF FOR CROSS-APPELLEE LANCE EISENBERG IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (pages 5-10).

* * *

Count One focuses on a loan from the Southeast First National Bank in Miami ("Southeast") to Hajecate Oil & Gas, Inc., a business owned by the Hajecates (R. at 397-98). It charges that Mid-Atlantic Petroleum Company, Ltd. ("Mapco"), an oil company allegedly controlled by the Hajecates, had substantial receipts which were kept in a foreign bank account in Mapco's name (R. at 397-98; 400-06). The indictment further alleges that the loan was in fact collateralized by Mapco funds, even though International Business Transactions, Ltd. ("IBT"), a Bahamian corporation not controlled by the Hajecates, purchased the certificates of deposit which were posted as collateral at the Southeast bank (R. at 400-03). The indictment charges that the loan was made and IBT was used to collateralize it in order to conceal Mapco and Hajecates' relationship with Mapco (R. at 400-02).

Even assuming the specific allegations are true—that the Hajecates controlled Mapco, that Mapco funds collateralized the bank loan, and that Mr. Eisenberg, with knowledge of these facts, helped structure the loan—there would be nothing wrongful, much less criminal, in such conduct by Mr. Eisenberg. In view of the tax consequences of the transaction, the loan was structured in accordance with sound tax advice.

Significantly, the indictment does not allege that the loan was a sham, *i.e.*, that the borrower had no bona fide obligation to repay the amount of its note to the Southeast bank, or that the bank required no security, or that market rate interest was not charged, or that the loan was not timely and promptly repaid.[3] As shown in Mr. Eisenberg's motion to dismiss, the

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[3] The indictment charged that the transaction was made to "appear to be a legitimate loan" (R. at 401). The government's brief now characterizes it as "a fictitious loan" (Govt. Brief at 33). Nowhere in the record is there an allegation that any of the indicia of a sham or

Southeast bank records, which the government possessed and has never challenged, show that these indicia of a "sham loan" are absent in this case (R. at 74-75).[4] Before the court below the government did not, because it could not, assert that the loan was a "sham."

The alleged conspiracy to obstruct the IRS seems premised in part on the theory that there was no lawful reason for the Hajecates to borrow funds through a domestic bank rather than directly from their own foreign source (Mapco),[5] especially since that foreign source arranged dollar-for-dollar collateral for the loan. The indictment concludes that the reason for structuring the loan through the domestic bank was to conceal Mapco and the Hajecates' relationship with it.[6] Both the theory

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fictitious loan were present in the transaction at issue. *See* United States v. Pomponio, 563 F.2d 659, 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *cf.* Alterman Foods, Inc. v. United States, 505 F.2d 873, 878-79 (5th Cir. 1974).

[4] Footnote 17 of Mr. Eisenberg's Motion to Dismiss stated (R. at 74):

> The indictment could not conceivably charge that the loan was illegitimate because the Miami bank records undeniably show that the loan was discounted and then paid off in full, with interest, and after only one year. Remarkably, none of this is included in the indictment which specifies at great length the Hajecates' receipt of the loan but contains nothing of its prompt repayment, a repayment long before any government investigation.

[5] Since both here and elsewhere the government has contended that Mapco did substantial business (*see* United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981)), it cannot assert that Mapco had no independent corporate existence. *See* Britt v. United States, 431 F.2d 227 (5th Cir. 1970).

[6] The indictment does not charge that the loan was a constructive dividend. It is axiomatic that a person may borrow money from his own company, provided that transaction is at arm's length, *i.e.*, is at prevailing interest rates, for a reasonable, fixed period of time and is timely repaid with market rate interest. *See Pomponio* and *Alterman Foods*, at note 3, *supra*.

and the conclusion are based on a faulty analysis of the tax and business considerations that dictated the loan structure.

Borrowing from a domestic rather than a foreign source in the present circumstances had a sound tax purpose—to avoid a 30% withholding tax. If the Hajecates had borrowed directly from a foreign entity (whether or not they controlled it), they would have been required to pay a 30% withholding tax on all payments of loan interest (26 U.S.C. §§ 881(a)(1) and 1442). By specific exemption, however, domestic banks are not required to withhold taxes on interest paid to offshore purchasers of certificates of deposit (§ 861(a)(1), (c)). Hence, it is less costly to structure a loan through a domestic bank, collateralized by an offshore lender, than to arrange a direct loan from abroad. In addition, use of a domestic bank as an intermediary provides a lender which will not only negotiate an arms-length loan but also will act as collection agent if necessary. The structure meets the standards of a bona fide loan and is widely known in international banking circles. Its use in the Southeast bank loan was consistent with sound tax advice.

The indictment charges that collateralization of the loan by IBT, rather than Mapco, was arranged to conceal Mapco's involvement. This charge ignores the statutes governing taxation of controlled foreign corporations. Assuming Mapco was controlled by the Hajecates, as alleged, they were obligated to report as taxable income their pro rata share of the corporation's increased earnings invested in United States property (§ 951(a)(1)(B)). Section 956 (b)(2)(A) of the Revenue Code provides that "United States property" does *not* include deposits with persons carrying on a banking business. Section 956(c), however, provides that a controlled foreign corporation does hold United States property if it is a guarantor of an obligation or pledgor of assets to secure its payment.

At the time of the Southeast bank loan no regulation offered any clarification of the relationship between § 956(b) and (c). Especially in these circumstances, the conservative course was to use a foreign intermediary that was not a controlled

foreign corporation to post the necessary collateral.[7] Such a course would avoid taxes on the interest earned by the foreign entity that posted the collateral.

The indictment further alleges that in June 1977, Mapco engaged in commodity straddles (R. at 402).[8] At that time straddles were widely recommended by tax advisers and brokerage firms as a means of eliminating "earnings and profits" and thereby avoiding taxes otherwise payable by U.S. taxpayers who owned or controlled foreign corporations.[9] If by using commodity straddles in June 1977, Mapco eliminated

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[7] Quite recently the IRS has attempted to clarify the relationship between §§ 956(b)(2)(A) and (c). *See* T.D. 7712, 1980-2 CUM. BULL. 226, *amending* Treas. Reg. §§ 1.956-1 and 1.956-2. The IRS decision to clarify this relationship with a Treasury Decision announcing a prospective regulation rather than a simple statement of position in a Revenue Ruling further demonstrates the soundness of advice to structure the loan as described above as well as the impropriety of bringing criminal charges in a field of such uncertain interpretation. *See generally* 26 U.S.C. § 7805 and 26 C.F.R. § 601.601 (1980).

[8] A commodity straddle is defined in the SENATE COMM. ON FINANCE, REP. ON THE ECONOMIC RECOVERY TAX ACT OF 1981, REP. NO. 97-144, 97th Cong., 1st Sess., 146 (July 6, 1981):

> A simple commodity straddle is constructed by taking equal long and short positions in futures contracts in the same commodity with different delivery dates. The two positions, called "legs," are expected to move in opposite directions but with approximately equal absolute changes. Thus, for example, if one leg of a straddle in futures contracts increases $500 in value, the other leg can be expected to decrease in value by about the same amount. By maintaining balanced positions, the risks of the transaction are minimized.

A similar definition appears in United States v. Turkish, 623 F.2d 769, 770 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 856 (1981).

[9] The Senate Report cited in the previous footnote stated (at 145-46):

> The possibility that certain transactions called spreads or straddles can defer income and convert ordinary income and short-term capital gain into long-term capital gain has been

earnings and profits, then the Hajecates would have owed no Mapco-related taxes when they filed their allegedly false tax returns in October 1977. Hence, the government's allegations regarding a straddle, rather than tending to show concealment and serving as a means to carry out the conspiracy, actually show the reverse—a straddle meant there was no reason to conceal Mapco from the IRS.[10]

In short, the conduct alleged in Count One which the government has specifically branded as improper represented sound tax and business practice. The government mischaracterized a legitimate loan transaction as the product of a criminal scheme and ignored the accepted use of commodity straddles for tax planning.

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recognized by the investment industry for decades. In the last ten to fifteen years, the use of such tax shelters in commodity futures has extended beyond investment professionals to significant numbers of taxpayers, individual and corporate, throughout the economy. The tax advantages of spread transactions, especially those structured in commodity futures contracts, have been touted in commodity manuals, tax services and financial journals. Brokerage firms have promoted tax spreads or straddles to their clients.

[10] The government does not, and cannot, allege that the silver straddle transactions of Mapco involved fraud. *Contrast* United States v. Turkish, 623 F.2d 769, 770 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 856 (1981), where the defendants were able to manipulate trading on the commodity in question.

REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (Pages 1-4)

I

REPLY TO THE ARGUMENTS OF CROSS-APPELLEE EISENBERG

A. Defendant Eisenberg argues (Br. 4-16) that the allegations in the indictment of the conspiracy to defraud the IRS are so vague and lacking in particularity as to deprive him of his constitutional rights. In particular, he claims that: (1) the indictment failed to state an offense because the alleged scheme was, on its face, a legitimate business transaction (Br. 5-10); and (2) the indictment failed to particularize the alleged scheme to defraud (Br. 11-16). In our view his arguments have no merit.

First, even assuming the two transactions, i.e., the loan and the commodity straddle, which are alleged in the indictment to be part of the scheme but which the defendant argues to have been legal, were in fact legitimate,[1] Count One as a whole nevertheless adequately describes an offense. "The sufficiency of indictments must be determined on the basis of practical rather than technical considerations and the validity of attacks on them must be considered from a broad and enlightened standpoint of right reason rather than from a narrow view of technicality and hairsplitting." *Robbins* v. *United States*, 476 F. 2d 26, 30 (10th Cir. 1973). Acts which are in themselves legal lose that character when they constitute elements of an unlawful scheme. *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 707 (1962).[2] Here, the indictment alleged, as some of the means

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[1] To a large extent, Eisenberg's argument depends upon his characterization of these transactions as being completely open and aboveboard. If the District Court relied to any extent upon these characterizations, it erred, of course, since no evidence was presented and, thus, there was no support for these claims.

[2] It is clear from the indictment that neither the loan nor the straddle are alleged to be unlawful; rather, they are alleged to have

and methods of the scheme, the following: (1) the defendants Tom and Mick Hajecate obtained and used the services of officers, directors, and employees of a Grand Cayman bank as agents and directors of MAPCO in order to conceal their interest in and authority over the MAPCO account in that bank from the IRS and the U.S. Custom Service;[3] (2) the same defendants used the "shell" company MAPCO to establish and maintain a "secret" bank account at the Grand Cayman bank for the purpose of "hiding, concealing, and holding receipts of money actually derived from the business activities" of the defendants' various companies "in order to conceal said business activities and receipts from the IRS";[4] (3) the same defendants withdrew currency in excess of $5,000.00 and brought such amounts of currency into the United States, failing to legally report such amounts to the U.S. Customs Service;[5] and

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been structured or utilized in such a way as to bring the unlawful object of the scheme, i.e., the impeding of the Internal Revenue Service (IRS), into fruition.

[3] Thus, in effect, this part of Count One alleged that the named defendants were using nominees, activities which the Supreme Court has deemed a badge of fraud. *Spies* v. *United States*, 317 U.S. 492, 499 (1943).

[4] This part of Count One expressly alleged acts of concealment, or "badges of fraud." *Id.*

[5] Defendant Eisenberg argues (Br. 18-19) that there was no allegation in the indictment "connecting" him to these activities of the other defendants, except that he was alleged to be a member of the conspiracy. He also claims that (Br. 19-20), assuming that he was part of the conspiracy, these activities of the other defendants were not illegal under this Court's construction of 31 U.S.C., Section 1101 in *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978).

Yet, certain overt acts allege his participation (see p. 8, *infra*), and, at all events it is quite sufficient that defendant Eisenberg be alleged to be part of the conspiracy in order that he be criminally liable for the acts of his coconspirators, *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Furthermore, it is quite premature for him to allege that no oral advice was given to the other defendants regard-

(4) all the defendants made false statements, on the individual tax returns of Tom and Mick Hajecate for the calendar years 1976 and 1977, regarding the Hajecates' interests in and authority over the "secret" MAPCO foreign bank account.[6] These selected portions of the means and methods alleged in Count One clearly allege a rather substantial variety of illegal conduct. Thus, defendant Eisenberg can hardly claim that the alleged scheme was, "on its face, a legitimate business transaction."

Second, regarding defendant Eisenberg's claim (Br. 11-16) that Count One failed to particularize the alleged scheme to defraud, we believe, as stated in our opening brief (pp. 33-36), that Count One is sufficiently clear: (a) to inform the defendants of the nature of the allegation against them; and (b) to enable them to plead an acquittal or conviction in bar of future prosecutions. The four objects of the conspiracy, as well as the means and methods (some of which are described, *supra*), set forth in Count One quite adequately go beyond the statutory language of 18 U.S.C., Section 371, and specifically allege the detail of the scheme. Contrary to defendant Eisenberg's claim, it was not necessary that Count One identify a particular tax

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ing the illegality of failing to report the foreign transportation of such amounts of currency, given the fact that the government had not yet introduced its evidence at trial. (See pp. 8-9, *infra*.)

[6] Defendant Eisenberg claims that: (1) the "question" on the tax return, which the government alleges to be falsely answered, was unauthorized by any statute or regulation (Br. 21-25); (2) both the regulation on which the foreign bank account question is based and the bank account question itself are impermissibly vague (Br. 25-28); (3) an alleged false statement in a tax return can be prosecuted only under the Internal Revenue Code (Br. 28-33); and (4) prosecution for the alleged false statements on the tax returns is barred by the "exculpatory no" doctrine (Br. 33-36). We anticipated and answered all of these arguments in our opening brief (see pp. 10-32 of our opening brief), and no further response is required.

liability affected by the obstruction of the IRS; rather, the Count merely had to (and, in fact, did) sufficiently describe the process of obstruction. See our opening brief at p. 35.[7]

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[7] In arguing that the conspiracy count was insufficient to charge an offense, defendant Eisenberg mistakenly relies upon several inapposite cases. First, citing *United States* v. *Enstam*, 622 F.2d 857, 861 (5th Cir. 1980), the defendant observes that this Court has held that the showing of a scheme to "launder illegally obtained money" through fictitious loans was insufficient to establish a conspiracy to defraud the government by impeding the Internal Revenue Service. Although we do not quarrel with this characterization of the courts holding, we note that this Court then examined the record in order to determine whether there was any evidence that one of the objects of the scheme was to impede the IRS (622 F.2d at pp. 861-862). Here, of course, the proceedings below never advanced to the point where the government put on its proof. Second, citing *United States* v. *Diez*, 515 F.2d 892, 897-898 (5th Cir. 1975), cert. denied, 423 U.S. 1052 (1976), the defendant claims that a showing of the filing of false tax returns is likewise insufficient to establish a conspiracy to impede the IRS. But, in *Diez* this Court merely ruled, 515 F.2d at 898, that the filing of false returns did not fully accomplish the purpose of the conspiracy, and thus the conspiracy was not terminated for the purpose of admitting statements of coconspirators made in furtherance of the conspiracy. Finally, citing *United States* v. *Tarnopol*, 561 F.2d 466, 474 (3d Cir. 1977), the defendant claims that court held that the failure to make bookkeeping entries of cash sales was insufficient to show a conspiracy to impede the IRS. But the court was concerned, 561 F.2d at 424-425, only that there was no *evidence* of intent, not with the sufficiency of the charge.

Supreme Court of the United States

No. A-525

LANCE EISENBERG,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1983.

/s/ Byron R. White
BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 18th day of December, 1982

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No. 82-1266

In the Supreme Court of the United States

OCTOBER TERM, 1982

LANCE EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1266

LANCE EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner challenges the conspiracy count in his indictment. He and two other individuals, Mick and Tom Hajecate, were charged as defendants in the United States District Court for the Southern District of Texas in an 11-count indictment. Count One charged all three with conspiring (Pet. App. 28a-37a) to (1) defraud the United States by impeding, impairing, obstructing, and defeating the lawful function of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of income taxes; (2) defraud the United States by impeding, impairing, obstructing and defeating the lawful function of the United States Customs Service in the collection, maintenance, and distribution of records pertaining to covered financial transactions of United States persons with foreign financial institutions, in violation of 31 U.S.C. 1121; (3) willfully make false statements on the 1976 and 1977 individual income tax returns of Mick Hajecate and Tom

Hajecate, in violation of 18 U.S.C. 1001; and (4) willfully transport to Houston, Texas, from Georgetown, Grand Cayman Island, monies in amounts exceeding $5,000 in United States currency without reporting the transportation of the monies to the United States Customs Service, in violation of 31 U.S.C. 1101. Counts Two and Three charged petitioner with aiding and abetting the Hajecates when they filed their false 1976 federal income tax returns, in violation of 18 U.S.C. 2 and 1001 (Pet. App. 38a-39a). None of the remaining counts in the indictment named petitioner as a defendant (Pet. App. 39a-44a).

Petitioner moved to dismiss the counts of the indictment against him. He challenged Count One on the grounds that: (1) it was too vague to state an offense; (2) it failed to specify whose tax liability was at issue; (3) the substantive offenses involving the making of false statements on the Hajecates' tax returns, charged as objects of the conspiracy, were legally insufficient because 18 U.S.C. 1001 was an inappropriate charge; and (4) the portion of the conspiracy count charging conspiracy to transfer funds from the Cayman Islands was vague. Petitioner challenged the substantive false statement counts (Counts Two and Three) on the grounds that: (1) the regulation (31 C.F.R. 103.24), upon which the question on the tax return concerning control over a foreign bank account was based, was vague and exceeded the statutory authorization (31 U.S.C. 1121(a)(1)); (2) under *United States* v. *Levy*, 533 F.2d 969 (5th Cir. 1976), there could be no prosecution for falsely answering a question that was not authorized by a statute or regulations; (3) the false negative responses to the questions on the Hajecates' tax returns were within the so-called "exculpatory no" rule; and (4) 18 U.S.C. 1001 is inapplicable in a prosecution for false statements on an income tax return because a more specific statute (26 U.S.C. 7206(1)) preempts its application in such cases.

After a hearing on the motion, the district court dismissed the indictment in its entirety. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-22a). The court held that (1) the conspiracy charge (Count One) was sufficient as to three of the four objects (first, second and fourth) alleged; (2) the so-called "exculpatory no" rule was a complete defense to Counts Two and Three, charging violations of 18 U.S.C. 1001 by falsely answering the questions on the tax returns concerning control over foreign bank accounts; and (3) the third object of the conspiracy charge (which related to false answers to the foreign bank account questions on the tax returns) similarly could not stand because of the "exculpatory no" defense.

2. Petitioner contends that the conspiracy charge against him failed to state an offense with respect to one of the objects, that it is unconstitutionally vague, and that another alleged object of the conspiracy was improperly raised to the level of a felony.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by

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[1]It is now more than two years since the return of the indictment and the district court's dismissal order. Further interlocutory review at this time would cause serious additional delay in the trial of the charges against petitioner.

this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1983

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[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1983-04